UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

And

NATURAL RESOURCES DEFENSE COUNCIL, INC. AND SIERRA CLUB,

Proposed Intervenor-Plaintiffs,

v.

DTE ENERGY COMPANY AND DETROIT EDISON COMPANY,

Defendants.

Civil Action No.
2:10-cv-13101-BAF-RSW

Judge Bernard A. Friedman

Magistrate Judge R. Steven Whalen

DEFENDANTS' OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF ISSUE PRESENTED

Whether this Court should deny Plaintiff's Motion for Preliminary Injunction, where Plaintiff has failed to meet its burden of proving that (i) it has a strong likelihood of succeeding on the merits; (ii) it is likely to suffer irreparable harm in the absence of an injunction; (iii) the injunction would not cause substantial harm to others, including Defendants; and (iv) an injunction is in the public interest.

Defendants' answer: Yes.

CONTROLLING OR OTHER APPROPRIATE AUTHORITY

Standard For Preliminary Injunctive Relief

Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365 (2008)
Detroit Newspaper *Publishers Ass'n v. Detroit Typographical Union*, 471 F.2d 872 (6th Cir. 1972)
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57 Fed. Reg. 32,314 (July 21, 1992)
67 Fed. Reg. 80,186 (Dec. 31, 2002)

MICH. ADMIN. CODE R. 336.2801

There Is no Irreparable Harm and the Proposed Remedy Is Inappropriate

Lucero v. Detroit Pub. Sch., 160 F.Supp.2d 767 (E.D. Mich. 2001)
Livonia Prop. Holdings, supra
U.S. v. Mass. Water Res. Auth., 256 F.3d 36 (1st Cir. 2001)

42 U.S.C. § 7409

Public Interest

Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986)

Defendants DTE Energy Company and Detroit Edison Company (collectively "Detroit Edison" or "the Company")[1] respectfully submit this opposition to Plaintiff's (Environmental Protection Agency, or "EPA") Motion for a Preliminary Injunction (Doc. No. 8).[2] EPA's motion should be denied.

For more than a decade, EPA has pursued an "enforcement initiative" against the utility industry under the New Source Review ("NSR") provisions of the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.* ("CAA" or "the Act"), with mixed results.[3] Now, for the first time, EPA is seeking a preliminary injunction in a case that is no different from the thirty or so others that have gone through the normal discovery and trial process over the past decade. Detroit Edison has already shown in its Motion to Strike (Doc. No. 15) that EPA's attempt to front-load this complex dispute in a truncated proceeding is an abuse of process and a significant waste of judicial resources, particularly since this Court has already ordered that emissions not increase at the unit at issue. For the reasons set forth in Detroit Edison's Motion to Strike, this Court should deny EPA's motion. Further, as discussed below, EPA cannot establish any of the four elements required for a preliminary injunction. For these reasons too, the Court should deny EPA's motion.

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[1] Detroit Edison is a wholly owned subsidiary of the holding company, DTE Energy Company, and is the sole owner and operator of the Monroe Power Plant. Defendants deny that DTE Energy is an operator of Monroe Unit 2, and do not intend to waive this or any claims or defenses by defining the defendants as "Detroit Edison" here.

[2] Citations to "Doc. No." in this brief refer to the docket entries on the Court's PACER system. Citations to EPA's Memorandum of Support (which is part of Doc. No. 8) are to "EPA Mem."

[3] For an account of the checkered history of EPA's enforcement initiative and its limited success, see Doc. No. 15 at 8-12. As one court put it, EPA's initiative is a "sport, which is not exactly what one would expect to find in a national regulatory enforcement program." *U.S. v. Ala. Power Co.*, 372 F.Supp.2d 1283, 1306 n.44 (N.D. Ala. 2005). "Mixed results" is probably charitable: The Eleventh Circuit ruled EPA's NSR order to the Tennessee Valley Authority ("TVA") unlawful. *TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). After more than a decade of litigation, in one case, a jury returned a verdict for EPA in only 4 out of 14 projects, and even that limited success was reversed, *U.S. v. Cinergy Corp.*, 2010 WL 4009180 (7th Cir. Oct. 12, 2010); and in another case, EPA agreed to dismiss with prejudice 4 out of 7 NSR modification claims before the liability trial set for October 2011. Stipulation of Dismissal of Certain Claims, Countercls. and Defenses, *U.S. v. Ala. Power Co.*, No. 2:01-cv-00152-VEH (N.D. Ala. Sept. 2, 2010).

BACKGROUND

I. The Clean Air Act and New Source Review

A. The New Source Review Program in Context

To hear EPA tell it, the NSR pre-construction permitting program is the key "tool to *reduce pollution from individual sources*" to prevent "premature death, heart attacks, and respiratory problems, among other effects." EPA Mem. at 1 (emphasis added). But this is not so. While the NSR program is an important component of the CAA, Congress never intended it to serve the function EPA ascribes to it here. In other settings, EPA has acknowledged:

> [T]he primary purpose of the major NSR program is *not to reduce emissions*, but to balance the need for environmental protection and economic growth. *That is, the goal of major NSR is to minimize emissions increases from new source growth.*

70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005) (emphasis added).[4] When EPA defended in the D.C. Circuit the very NSR regulatory provisions it now accuses Detroit Edison of violating, EPA told the court the "purpose of the NSR provisions is not to compel emission *reductions* from existing sources," and there is "no basis" to the claims that "Congress intended NSR to compel emission reductions from older plants as they were refurbished." *See* Br. for Respondent EPA at 73, 74, *New York v. EPA*, No. 02-1387 (D.C. Cir. Oct. 26, 2004) (emphasis in original).

In short, NSR is not, and was never intended to be, an emissions reduction program. It is a growth management program. *See, e.g.*, 42 U.S.C. § 7470(3) (The NSR program "insure[s] that economic growth will occur in a manner consistent with the preservation of existing clean

[4] *See also* 70 Fed. Reg. 39,413, 39,418 (July 8, 2005) ("We do not believe that the structure of the Act and purpose of major NSR support a conclusion that Congress included major NSR . . . for the purpose of generating emissions reductions."); 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004) (Because the "NSR program is a growth measure and is not specifically designed to produce emissions reductions," states "do not rely on the NSR program to generate emissions reductions to move an area further toward attainment.").

air resources."). Substantial emission reductions have been and will continue to be achieved by a host of other non-NSR programs, including State Implementation Plans ("SIPs") specifically designed to meet or exceed federal air quality standards, *id.* § 7410; visibility protection programs, *id.* §§ 7491-92; and the Title IV Acid Rain program, *id.* §§ 7651-7651*o*. These programs effectively control emissions from existing sources like Monroe Unit 2 to protect the public health and welfare. EPA does not allege that Detroit Edison is operating Monroe Unit 2 in violation of any of these programs, that the unit's current level of emissions violates any federal or state air quality standards, or even that the unit's current level of emissions exceeds historical levels.

B. Statutory and Regulatory Background

A summary of the statutory and regulatory background serves to place NSR in context.

1. Existing Source Programs under the 1970 CAA Amendments

Congress in 1970 directed EPA to develop National Ambient Air Quality Standards ("NAAQS") to protect the nation's public health with an adequate margin of safety. 42 U.S.C. § 7409. The states, in turn, were to develop SIPs, setting source-by-source emissions limits to meet the NAAQS. *Id.* § 7410. These limits are premised on a permitted source operating at its full design capacity (*i.e.*, all year at full production capacity) without exceeding the NAAQS.[5]

2. New Source Programs

The 1970 CAA Amendments further directed EPA to issue "new source performance standards" ("NSPS"), which are technology-based standards that regulate emissions from "new sources." 42 U.S.C. § 7411(b). In general, these controls are "more stringent than those needed to meet [the] NAAQS." *See Ala. Power Co. v. Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979).

[5] *See, e.g.*, *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978) ("The model [used to calculate SIP limits] is operated on the assumption that the plants concerned operate 24 hours a day at full capacity and predictions are made for every day of the year.").

NSPS apply to new sources of emissions—*i.e.*, newly-constructed emission units or "modifications" of existing units, *id.* § 7411(a)(2) (defining "new source" as one on which "construction or modification ... is commenced after" a given date). "Modification" is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant ... not previously emitted." *Id.* § 7411(a)(4).

In 1977, Congress further amended the CAA by enacting two more New Source programs: the Prevention of Significant Deterioration ("PSD") and the Nonattainment New Source Review ("NNSR") program.[6] Congress defined "modification" under PSD and NNSR to mean the same as it was defined under the NSPS program. *See* 42 U.S.C. §§ 7479(2)(C);7501(4).

3. The NSR Rules at Issue Here

Following the 1977 CAA Amendments, EPA promulgated rules to implement the PSD and NNSR programs. Those rules have been revised from time to time. The NSR rules at issue here are the result of revisions adopted by EPA in December 2002, *see* 67 Fed. Reg. 80,186 (Dec. 31, 2002), which were, for the most part, upheld by the D.C. Circuit in *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) ("*New York I*"). EPA has approved Michigan's SIP with respect to the PSD rules, but not as to the relevant NNSR rules.[7] Accordingly, the Michigan SIP sets forth the PSD rules that are at issue in this case, while the federal rules control as to NNSR. In general, the NSR rules require that a preconstruction permit be obtained whenever a new source is to be built or when an existing major stationary source is to undertake a project that constitutes a

[6] The PSD program applies to those areas of the country that are in "attainment" (*i.e.*, meet the NAAQS) for a given pollutant; the NNSR program applies in those areas that are in "non-attainment" for a given pollutant. This Opposition refers to PSD and NNSR together as "NSR."

[7] Both PSD and NNSR programs are relevant because Monroe County, where the Monroe Plant is located, is currently designated as in attainment for sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") but not so with respect to particulate matter that consists of particles of less than 2.5 microns in diameter ("$PM_{2.5}$"). *But see* Declaration of Dr. George T. Wolff ("Wolff Decl."), Ex. 1, ¶ 7 (stating that, in fact, the Detroit region met the applicable $PM_{2.5}$ standards in 2009).

"major modification" to that source. *See, e.g.*, MICH. ADMIN. CODE R. 336.2802.

As relevant here, the language defining "major modification" under both programs is the same. That definition tracks the statutory language in requiring that, for a proposed activity to constitute a "modification," there must be (i) a "physical or operational change" that (ii) "results in" (*i.e.*, causes) (iii) a "significant emissions increase." *Id.* 336.2801(aa)(i); 40 C.F.R. pt. 51, App. S. The rules define "physical change" as *not* including activity considered to be "routine maintenance, repair, [or] replacement." MICH. ADMIN. CODE R. 336.2801(aa)(iii)(A).[8] Consistent with the statutory requirement that only those "changes" that actually *cause* an "emissions increase" can constitute a "major modification," the NSR rules further provide that, in projecting whether there will be an emissions increase as a result of a particular "change," any increases that are attributable to "unrelated" factors, such as increased utilization of the source due to growth in power demand, must be excluded from the calculation. *See id.* 336.2801(ll)(ii)(A)-(C).

An NSR permit for projects that would constitute a "major modification" requires, among other things, that the modified unit meet a level of emissions reflecting what the permitting authority determines as "Best Available Control Technology" or BACT.[9] Such projects can also be done without triggering NSR by taking measures to avoid significant emissions increases due to

[8] The history of EPA's adoption and interpretation of the "routine maintenance, repair, and replacement" provision is set forth at length in *U.S. v. Duke Energy Corp.*, 278 F.Supp.2d 619, 630-637 (M.D.N.C. 2003), *aff'd on other grounds*, 411 F.3d 539 (4th Cir. 2005), *vacated in Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561 (2007). After taking account of that history, the court found that, through EPA's "statements in the *Federal Register*, its statements to the regulated community and Congress, and its conduct for at least two decades," the Agency "has established an interpretation of [the 'routine' provision] under which routine is judged by reference to whether a particular activity is routine in the industry." *Id.* at 637. EPA sought to vacate that decision in its entirety, when the case was reassigned to a new judge after the Supreme Court remand. The court rejected EPA's request as to "routine," reaffirming that "EPA is bound by its own interpretation of the PSD regulations, which have consistently referenced industry standards." *U.S. v. Duke Energy Corp.*, 2010 WL 3023517, at *7 (M.D.N.C. July 28, 2010).

[9] Under NNSR, such a unit is required to meet a level of emissions that reflects technology equivalent to the "Lowest Achievable Emission Rate" or LAER. Except where context may otherwise indicate, references herein to "BACT" should be understood to refer also to LAER.

the project—*e.g.*, (1) adopting administrative or other constraints as a part of the project on the unit to offset the projected increases in utilization or emissions, if any, otherwise attributable to the project; (2) adopting a "synthetic minor" approach;[10] or (3) offsetting emissions increases at the unit with "contemporaneous" decreases elsewhere at the plant. Campbell Decl. ¶ 11.

II. Factual Background

A. Detroit Edison

Detroit Edison is an energy company headquartered in Detroit and has provided electricity to Michigan since the early 1900s. Declaration of Skiles W. Boyd ("Boyd Decl."), Ex. 3, ¶ 1. The Monroe power plant consists of four coal-fired electric generating units placed in service in the early 1970s. *Id.* ¶ 4. The plant is one of the largest employers and taxpayers in Monroe County, with approximately 400 permanent and 100 long-term contract employees. *Id.* As a regulated public utility under the jurisdiction of the Michigan Public Service Commission, Detroit Edison has a duty to maintain an adequate supply of generating capacity so that electricity is available upon demand at reasonable cost. *Id.* ¶ 5. The safe, reliable and continued operation of Monroe Unit 2 is a critical component of meeting this demand. *Id.* That unit alone supplies electricity to over 100,000 residential customers and businesses in southeast Michigan. *Id.*

EPA attempts to create the impression that Detroit Edison has supplied this electricity to Michigan in an environmentally irresponsible manner. Not so. Detroit Edison has substantially decreased its emissions, including of SO_2 and NO_x, over the years, and is currently decreasing them at an accelerated pace. Boyd Decl. ¶ 6. At the Monroe Plant in particular, Detroit Edison has reduced annual SO_2 emissions by about 69% since the early 1990s and annual NO_x emis-

[10] "Synthetic minor" is a term of art that refers to implementing whatever measures are necessary (*e.g.*, permit limits) to ensure that the project at issue does not result in a significant emissions increase for *any* reason, whether related or unrelated to the project. Declaration of Colin M. Campbell ("Campbell Decl."), Ex. 2, ¶ 11.

sions by about 79% since the mid-1990s. Declaration of William C. Rogers ("Rogers Decl."), Ex. 4, ¶ 8; Boyd Decl. ¶ 7. More recently, Detroit Edison embarked on a $2 billion program to install advanced SO_2 and NO_x controls at Monroe. In 2005-2006, Detroit Edison installed second generation low-NO_x burners on Monroe Units 1-4 (first generation low-NO_x burners were installed in the mid-1990s). Boyd Decl. ¶ 8. After several years of construction, it started operating Selective Catalytic Reduction ("SCR") systems on Monroe Units 1 and 4 in 2003, and on Unit 3 in 2007; and Flue Gas Desulfurization ("FGD") systems on Units 3 and 4 in 2009. *Id.* These are the types of control equipment EPA is asking be installed at Monroe Unit 2 in this lawsuit. Construction work has already started on FGDs for Monroe Units 1 and 2, however, with final tie-in and operation in 2014. *Id.* Detroit Edison plans to start constructing the Unit 2 SCR in 2011, with completion and start-up in 2014. *Id.* When Detroit Edison's $2 billion pollution control plan is done, all four Monroe units will have low-NO_x burners, SCRs, and FGDs, creating one of the cleanest and most efficient coal-fired power plants in the country. *Id.* ¶ 9.

B. The Monroe Unit 2 Work

Because Detroit Edison's facilities are subject to harsh operating conditions, the Company must frequently repair and replace deteriorating tubes and related components. Like every other electric utility company in the country, Detroit Edison regularly performs maintenance activities to ensure its units run efficiently and safely and without interruption and without injury to its workforce. Like every other utility in the country, Detroit Edison periodically removes its units from service for up to three months to perform this maintenance work. *Id.* ¶ 12.

Before commencing this work, Detroit Edison submits a planned outage notification to Michigan's air permitting authority—the Michigan Department of Natural Resources and Environment ("MDNRE"). *Id.* ¶ 15. These notifications have been discussed with and are regularly submitted to MDNRE in accordance with applicable regulations. *Id.* They explain in detail the

scope and purpose of the project, the length of the particular outage, whether the project will result in any significant increase of emissions from the unit, and whether or not the project is a "major modification" that could trigger permitting obligations under NSR.

The work at issue involved projects undertaken in a single outage, primarily the replacement of deteriorating tube components called economizers, reheaters, and waterwalls ("Project"). *Id.* ¶ 17. Detroit Edison sent an outage notification to MDNRE before the outage began, explaining why the Project was "routine maintenance, repair, and replacement," and would not result in a significant emissions increase. *Id.*; Ex. 2 to Boyd Decl. (Notification letter).[11] For these reasons, it concluded the planned Project did not trigger any CAA permitting obligations. MDNRE did not question Detroit Edison's determination, either then or since that time. Boyd Decl. ¶ 17. The Project commenced on March 13, 2010, and concluded on June 20, 2010. *Id.* ¶ 18.

C. EPA's Challenge to the Monroe Unit 2 Project

Citing a local newspaper article, EPA challenged the Project for the first time on May 28, 2010, asserting it constituted a "major modification." Letter from Phillip A. Brooks (EPA) to Michael J. Solo (Detroit Edison) (May 28, 2010) (Ex. 5). In that same letter, which EPA sent on the Friday before the Memorial Day weekend, EPA demanded that Detroit Edison produce, the first day after the holiday, "[a]ny additional information" that supports the Company's "contention that the work done during this outage does *not* require a permit." *Id.* at 2 (emphasis in original). Detroit Edison did its best in the time allotted, responding on June 1. Letter from Michael J. Solo (Detroit Edison) to Sabrina Argentieri (EPA) (June 1, 2010) (Boyd Decl. Ex. 3). Unsatis-

[11] EPA's observation that Detroit Edison sent its pre-project notification to MDNRE one day before construction started requires clarification. Detroit Edison regularly communicates with MDNRE and the agency was aware of the Monroe Unit 2 Project before the final submission. Boyd Decl. ¶ 15. Detroit Edison complied with the applicable rules, which specify such notifications must be submitted "before beginning actual construction." MICH. ADMIN. CODE R. 336.2818(3)(b).

fied, EPA sent a flurry of administrative requests for additional information under CAA § 114. *See, e.g.*, Letter from Phillip A. Brooks (EPA) to Michael J. Solo (Detroit Edison) (June 2, 2010) (Ex. 6). Detroit Edison provided EPA with the requested additional information. *See, e.g.*, Letter from Michael J. Solo (Detroit Edison) to Mark Palermo (EPA) (June 3, 2010) (Ex. 7).

EPA issued a "Notice and Finding of Violation" ("NOV") to Detroit Edison on June 4, 2010, asserting the "replacement projects …are major modifications under the [CAA] and the Michigan implementing regulations." EPA NOV ¶ 21 (June 4, 2010) (Ex. 8). During a short telephone call on June 16, EPA told Detroit Edison that it was not interested in discussing the legal basis for the June 4 NOV or EPA's position regarding the adequacy of the notification that Detroit Edison had provided to MDNRE before the Project.[12] Rather, EPA presented Detroit Edison with its demand for substantial emission reductions at plants unrelated to the Monroe Project and told the Company that it had one week to accept. Boyd Decl. ¶¶ 19-20. EPA filed its Complaint on August 5 and its preliminary injunction motion the next day. Docs. No. 1, 8.

LEGAL STANDARD FOR A PRELIMINARY INJUNCTION

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council,* 129 S.Ct. 365, 376 (2008), *citing Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis added); *see also Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) ("A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries its burden of proving that the circumstances clearly demand it"). There is "no power the exercise of which is more delicate, which requires greater caution, deliberation, and

[12] It is not true that EPA had previously offered to explain to Detroit Edison why it believed the Company's notification procedures are incorrect, *see* EPA Mem. at 12. Boyd Decl. ¶ 16.

sound discretion, or more dangerous in a doubtful case, than … issuing an injunction." *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union*, 471 F.2d 872, 876 (6th Cir. 1972).

A plaintiff seeking a preliminary injunction bears the burden of establishing that (1) there is a strong likelihood of success on the merits; (2) plaintiff is likely to suffer irreparable harm without the injunction; (3) the injunction would not cause substantial harm to others, including the defendant; and (4) an injunction is in the public interest. *See, e.g., ACLU of Ky. v. McCreary Cnty., Ky.*, 354 F.3d 438, 445 (6th Cir. 2003). Although these "factors are to be balanced," a "finding that there is no likelihood of irreparable harm … or no likelihood for success on the merits … is usually fatal." *Livonia Prop. Holdings v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, __ F.Supp.2d __, 2010 WL 1956867, *4 (E.D. Mich. May 13, 2010) (citations omitted).

ARGUMENT

I. EPA Has Not Shown That It Is Likely to Succeed on the Merits.

To establish that it is "likely to succeed on the merits," EPA must establish two separate things. First, EPA must show that the Project constituted a "physical change" within the meaning of the NSR rules, *i.e.*, that it was not "routine maintenance, repair, or replacement." Second, EPA must show that, assuming the Project did constitute a "non-routine" physical change, it caused a "significant net emissions increase." EPA fails on both counts.

A. EPA Has Not Established That It Is Likely to Prevail on Its Argument that the Monroe Unit 2 Work Is Not Routine Repair or Replacement.

The NSR rules provide that a "[p]hysical change ... *shall not include* … Routine maintenance, repair, and replacement." MICH. ADMIN. CODE R. 336.2801(aa)(iii) (emphasis added). In its March 12, 2010 notification to MDNRE, Detroit Edison submitted information on "activities that utilities must perform to keep electric generating facilities operational." Ex. 2 to Boyd Decl. Detroit Edison explained that because the replacement projects were common industry repair and

replacement work, they could not be a "physical change" under the Michigan SIP. As the party seeking a preliminary injunction, EPA must show that it is likely to succeed on its claim that the Project was a "physical change," and not "routine" maintenance, repair or replacement.[13]

EPA contends "common sense compels the conclusion" the Project was "anything but routine." EPA Mem. at 18. But EPA fails to address the legal standard for evaluating whether the Project is "routine," and it fails to show it is likely to prevail on this element of its claim.

Legal standard for "routine"—In its brief, EPA discusses the so-called "WEPCo factors,"[14] claiming each factor supports its position. EPA never addresses the critical legal issue, however: What is the legal standard against which those factors must be evaluated?

As the Eleventh Circuit observed almost a decade ago, at the very outset of EPA's enforcement initiative, "[a] central disagreement" in these cases "is whether 'routine' should be defined relative to an industrial category or to a particular unit." *TVA v. U.S. EPA*, 278 F.3d 1184, 1189 n.3 (11th Cir. 2002); *see also Duke Energy*, 278 F.Supp.2d at 630 ("The court is presented with two different interpretations of the RMRR exemption … The EPA argues … the activity [must be] … routinely performed at an individual unit …. Duke Energy asserts that the "'routine' inquiry … [is] whether a project is routine in the industry."). This issue has been con-

[13] EPA argues the "routine" provision is an "exemption," and the "burden of demonstrating that" it applies "rests with" Detroit Edison. EPA Mem. at 19. Regardless of how the burden on "routine" might apply at trial, as the movant for a preliminary injunction, EPA must ultimately establish here its likelihood of success on the merits, including against any defenses Defendants raise. *See Mazurek*, 520 U.S. at 972 (preliminary injunction "should not be granted unless the movant, by a clear showing, carries the burden of persuasion."); *see also BorgWarner, Inc. v. Dorman Prods., Inc.*, 2009 WL 4885009, *3-4 (E.D. Mich. Dec. 11, 2009) (in patent infringement case, movant for a preliminary injunction must show it is likely to withstand defendant's challenge to the validity and enforceability of the patent, a key element in patent enforcement); *Warrior Sports, Inc. v. STX, L.L.C.*, 2008 WL 783768, *4 (E.D. Mich. Mar. 19, 2008) (same).

[14] The "WEPCo factors" are so named because they were first identified by EPA in a 1988 applicability determination involving the Wisconsin Electric Power Company. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCo*.") These factors are: (1) the "nature and extent" of the project, (2) the "purpose" of the project, (3) the "frequency" at which such projects are undertaken, and (4) the "cost" of the project. *Id.* at 910.

fronted by every court that has faced applying the "routine" provision to particular projects.

Outside the context of litigation, EPA has "clarif[ied] that the determination of whether the repair or replacement of a particular item of equipment is 'routine' under the NSR regulations, while made on a case-by-case basis, *must* be based on the evaluation of whether that type of equipment has been repaired or replaced by *sources within the relevant industrial category*." *See* 57 Fed. Reg. 32,314, 32,326 (July 21, 1992) (emphasis added). Reflecting EPA's *Federal Register* "clarification," as well as two decades of EPA's statements and conduct preceding the enforcement initiative, most courts that have addressed this issue have adopted a "routine in the industry" standard. *See, e.g., Nat'l Parks Conservation Ass'n v. TVA ("NPCA v. TVA")*, 618 F.Supp.2d 815, 824 (E.D. Tenn. 2009) (reviewing the cases and adopting the reasoning of the majority of the courts "that have adopted the 'routine in the industry' standard.").[15]

Neglecting to advise the Court of this legal issue, EPA relies on a single decision that adopted EPA's "routine at the unit" test: *U.S. v. Ohio Edison Company*.[16] EPA then proceeds to evaluate the Project under the presumption that the *only* relevant consideration is what Detroit Edison has done previously at that unit.[17]

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[15] *See also U.S. v. E. Ky. Power Coop.*, 498 F.Supp.2d 976, 993 (E.D. Ky. 2007) ("determin[ation] whether . . . projects fall under the ['routine'] exclusion by applying the *WEPCO* multi-factor test" will be made "with reference to the industry as a whole, not just the particular … unit at issue."); *Ala. Power Co.*, 372 F.Supp.2d at 1307 (The "routine" provision "applies to projects that are routine within the industry, by which is meant work of a type performed commonly within the industry, although perhaps infrequently at any specific one or more of . . . particular plants."); *Duke Energy*, 278 F.Supp.2d at 637 ("Through the EPA's statements in the *Federal Register*, its statements to the regulated community and Congress, and its conduct for at least two decades the EPA has established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry.").

[16] 276 F.Supp.2d. 829, 856 (S.D. Ohio 2003) ("It is the frequency of an activity at a particular unit that is most instructive in the analysis of what can be considered 'routine,'" whereas the "types of activities undertaken within the industry as a whole have little bearing on the issue if an activity is performed at a unit only once or twice in the lifetime of that particular unit.").

[17] *See, e.g.,* EPA Mem. at 20. For instance, EPA states this was the "first time" that the Company had "completely replaced the economizer or pendent reheater at Monroe Unit 2," and fails

(continued…)

The *Ohio Edison* case on which EPA relies has been rejected by the many courts that have adopted the "industrial category" standard enunciated by EPA in the *Federal Register*. *See, e.g., Duke Energy*, 278 F.Supp.2d at 631 n.10 ("[T]his court, for the reasons contained herein, respectfully disagrees."); *Ala. Power*, 372 F.Supp. at 1305-06 ("Lacking in the *Ohio Edison* [opinion] … are the reasons the EPA's post-*WEPCO* statements and actions … count for so little …. [T]he court finds *Duke Energy* clearly more thorough, comprehensive and rigorous in its analysis."); *NPCA v. TVA*, 2010 WL 1291335, at *24-26 (E.D. Tenn. Mar. 31, 2010) (Explaining at length why projects of the type addressed in *Ohio Edison* "fall within the routine maintenance, repair, and replacement exception.").[18] While it will ultimately be up to this Court to determine, as a matter of law, whether "routine in the industry" or "routine at the unit" is the correct legal standard, EPA's failure even to acknowledge this threshold issue demonstrates that its motion cannot as a matter of law establish EPA's likelihood of success on the merits.

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to account for the frequency at which such equipment replacements might be undertaken in the utility industry generally. *Id.* EPA finds further significance in the fact that this was the "first time" that the Company had "performed work on both the economizer and the reheater at the same time" at Monroe Unit 2. *Id.* (emphasis removed). That these projects were "unprecedented" *at Monroe Unit 2*, EPA asserts, "makes it clear that this project is highly infrequent." *Id.*

[18] Apart from the solitary *Ohio Edison* decision, EPA invokes an applicability determination it issued to Detroit Edison in May 2000 in which EPA supposedly "made the limited nature of the ['routine'] exemption clear." *See* EPA Mem. at 7. That determination was not a rule, and Detroit Edison did not challenge it because its ultimate conclusion was that the project at issue did *not* require NSR permitting. *See* Boyd Decl. ¶ 10. Further, that determination was "issued following the EPA's decision in 1999 to initiate a number of enforcement proceedings," and given its "potentially self-serving nature," the determination did "not evidence a long-standing interpretation." *Duke Energy*, 278 F.Supp.2d at 630 n.8. EPA's long-standing routine-in-the-industry standard cannot be changed absent notice-and-comment rulemaking. *See*, *e.g.*, *id.* at 637; *see also Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), *citing Alaska Prof'l Hunters Ass'n v. Fed. Aviation Admin.*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).

EPA also contends *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) *("New York II")* requires a *de minimis* interpretation of the routine provision. EPA Mem. at 6. But *New York II* did not address the current rules—it addressed only whether a revised provision that would have excluded projects costing up to 20% of the replacement cost of an entirely new unit was lawful, and struck it down. Indeed, it is telling that the majority of decisions that have rejected EPA's enforcement "routine at the unit" re-interpretation were decided *after New York II,* and EPA's attempts to vacate, in light of *New York II*, the two leading decisions on this point failed. *Duke Energy*, 2010 WL 3023517, at *8; *U.S. v. Ala. Power Co.*, 681 F.Supp.2d 1292, 1308-12 (N.D. Ala. 2008).

Application of the WEPCo factors—Ten years ago, TVA, the government agency that has for "more than 65 years" operated and maintained "various kinds of power-generating technologies," published a *Federal Register* notice of an updated report on "routine maintenance, repair and replacement." 65 Fed. Reg. 35,154 (June 1, 2000). In accordance with its statutory directive "to collect data and report on practices, methods, facilities and equipment and the economic integration of [electric generating] plants and systems," *id.* at 35,155, TVA in 1972 had "reported on its generating unit maintenance practices." In its more recent, updated report, TVA explained "[i]t has been routine practice within TVA and the utility industry for decades to replace components and systems with state-of-the-art equipment and materials" when those components deteriorate. *Id.* In the electric utility industry, tube components such as economizers and reheaters "are routinely replaced throughout the lives of units." *Id.*

Agreeing with TVA's view of "routine," the *NPCA* court only recently concluded, following a bench trial in which fact and expert testimony was presented, that replacement of tube components (there, an economizer and a superheater) were "routine" in the utility industry. The court rejected the view of the plaintiffs' expert Alan Hekking (EPA's declarant here too), and found that projects similar to those at issue here were "routine" under each WEPCo factor. 2010 WL 1291335 at *24-26. The court explained that once "facts like those cited by the *Ohio Edison* court [are] placed in their proper context," the projects are clearly "routine." *Id.* at *32, *26.

For example, as in this case, Hekking in *NPCA* testified that tube component replacements could not be considered "routine" because TVA had to "hire a large number of outside craftsmen and laborers to complete the project," *id.* at *24;[19] the costs of the economizer were

[19] Hekking makes the same arguments here. *See* Doc. No. 8, Ex. 6 at 12 (The Project "could only have been done by outside specialty contractors using hundreds of workers ….").

"classified as capital improvements" and "required authorization from the TVA Board of Directors," *id.* at *24-25;[20] "cranes, monorails and an extensive rigging system" were used to hoist materials into place, *id.* at *24; and "over sixty-seven miles of … tubing" was replaced. *Id.* at *18. The court found that while replacing an economizer or superheater "is not a small task" (for instance, the work may have required the use of a "giant crane"), it is "not an extraordinary task" when put in the context of a massive electric utility generating station. *Id.* at *25, *28. The same is true here. *See* Declaration of Jerry L. Golden ("Golden Decl."), Ex. 9, ¶¶ 16-20.

The *NPCA* court reached similar conclusions for the "frequency," "purpose," and "cost" factors, again crediting Golden's testimony and rejecting Hekking's contrary view. It found that economizer and superheater "replacements [are] common in the industry," 2010 WL 1291335 at *25, *28; that the purpose of the replacement projects ("to improve the reliability and availability of these components") is consistent with the purpose of most maintenance at power plants and therefore "routine," *id.* at *33, *25, *28; and that the cost for that replacement was not "uncommonly high." *Id.* at *26, 30. The same is true for all three factors here. Golden Decl. ¶¶ 18-20.

Ignoring *NPCA* and industry experience, EPA touts a feature story on the Project that ran on April 22, 2010 in a local newspaper. *See* EPA Mem. at 11, 19. EPA cites that news article to highlight such colorful (but legally irrelevant and hearsay) observations as the "new components are so heavy that they must be hoisted in pieces by a 'giant crane.'" *Id.* at 11. Given that, as the story notes, the unit is some 12 stories high, it seems unremarkable that a "giant" crane would be used to move its steel components. And while EPA apparently hopes this Court would somehow discern significance in the story's headline—"Extreme makeover: Power plant edition"—it fails

[20] *Compare, here,* EPA Mem. at 19 ("Both the economizer and pendant reheater replacements were considered major capital projects by [Detroit Edison], and required the approval of senior company officials ….").

to note the story itself characterizes this "makeover" as a "*maintenance* shutdown" that Detroit Edison had undertaken while "the plant also continues to be the focus of other unrelated work that is adding costly equipment to further reduce its emissions." *See* Doc. No. 8, Ex. 2-D. This recession-driven article, which appears to focus mainly on the statements of a contractor apparently eager to highlight the jobs that the work created in Michigan, *see* Boyd Decl. ¶ 21, does not substitute for a proper analysis of the Project under the relevant legal standard.

B. EPA Has Failed to Establish that It Is Likely to Prevail on Its Argument that the Monroe Project Caused a Significant Net Emissions Increase.

In its notification to MDNRE, Detroit Edison explained that emissions and operations of Monroe 2 "fluctuate year-to-year due to market conditions,… weather, availability of other units, transmission limitations, electrical system security, etc." Ex. 2 to Boyd Decl., at 2. As a result, the Company projected that future emissions above baseline levels would be the result of independent factors, and "the project will not result in an emissions increase." *Id.*; Boyd Decl. ¶ 17.

MDNRE never took issue with the Company's notification. EPA now argues, however, that Detroit Edison should have projected that the tube replacements would cause emissions to increase for two reasons: (i) the Company cannot prove that "its projected emissions increase [i]s unrelated to the project;" and (ii) "Plaintiff's witnesses have … determined that the company should expect emissions to increase." EPA Mem. at 21. EPA's arguments ignore the applicable legal standard, and its alternative projections are neither technically sound nor reasonable.

Legal standard for "emissions increase"—Under the NSR rules, even if a project is a "physical change," it cannot be a major modification unless it *results in* a "significant emissions increase." *E.g.*, MICH. ADMIN. CODE R. 336.2801(aa)(i). To make this showing, it is necessary to (i) determine the emission unit's "baseline" annual emissions prior to the change; (ii) make a "projection" of the unit's annual emissions following the change; and (iii) establish that any

"projected" increase in annual emissions is attributable to—*i.e.*, is actually caused by—the physical change at issue.[21] The causation requirement is the crux of the dispute here.

EPA claims Detroit Edison has the burden, in this enforcement action, of proving that any projected emissions increase was *not* caused by the Project. EPA Mem. at 22. EPA then claims that because Detroit Edison in its notification to MDNRE projected an increase in utilization and emissions *following* the Project in 2013, that increase is *ipso facto* due to the Project. *See, e.g., Id.* at 21-22. This is not the law.

First, as EPA has explained elsewhere, "[b]oth the statute and implementing regulations indicate that there should be a causal link between the proposed change and any post-change increase in emissions." *New York I,* 413 F.3d at 32, *quoting* 67 Fed. Reg. at 80,203; *see also* 57 Fed. Reg. at 32,325 ("NSR applies *only* where the emissions increase is *caused by* the change.") (Emphasis added). As a result, "when a projected increase in equipment utilization is in response to a factor *such as* growth in market demand," that projected increase is irrelevant to the modification determination and must be "subtract[ed] … from the unit's projected actual emissions." 67 Fed. Reg. at 80,203 (emphasis added). To give effect to the statutory causation requirement, EPA's NSR rules require that a utility "*shall* … [e]xclude, in calculating any increase in emissions … that portion of the unit's emissions following the project that an existing unit could have accommodated during [the baseline period] … and that are also unrelated to the particular project, *including* any increased utilization due to product demand growth." MICH. ADMIN. CODE R. 336.2801(ll)(ii)(C) (emphasis added).

Second, EPA has made clear that an emissions increase due to demand growth is but one

[21] MICH. ADMIN. CODE R. 336.2801(b), (ll); 336.2802(4)(a). The NSR rules further require that there be a significant "net" emissions increase, and that any resulting "net" emissions increase be above certain specified "significance" levels for the pollutant involved. *Id.*; 336.2801(qq).

example of increases that a utility must exclude from its emission projection to satisfy the statute and regulations. As EPA explained in promulgating the NSR rule for electric utilities,

> [E]lectricity demand and resultant utility operations fluctuate in response to various factors such as annual variability in climactic or economic conditions that affect demand, or changes at other plants in the utility system that affect the dispatch of a particular plant.

57 Fed. Reg. at 32,325. Thus, where *any* factors independent from a project are expected to cause increased utilization, the rules require exclusion of any associated emissions increase.

Third, for these reasons, EPA has said that in any given case there is "the very real possibility that emissions might increase over baseline levels in the future for reasons unrelated to the … change in question." *Id.* at 32,325. As a result, EPA's rules provide that only where a projected emissions increase "could not be physically or legally accommodated during the representative baseline period *but for* the proposed … change," will the project "be deemed to have resulted in the increase." *Id.* at 32,327 (emphasis added). By contrast, where (as here) a projected emissions increase could have been accommodated in the baseline period,[22] "EPA declines to create a presumption" that the increase is "inextricably linked" to the change. 57 Fed. Reg. at 32,327. To assure that the major modification rule "in no way … discourage[s] physical or operational changes that increase efficiency or reliability or lower operating costs, or improve other operational characteristics of the unit," EPA explained that a project must be "the *predominant cause* of the change in emissions" for the project to be subject to NSR. *Id.* (emphasis added).

Finally, because "causation" is an element of the statutory and regulatory definition of "modification," EPA in an enforcement action has the burden of demonstrating that the project in

[22] EPA's motion does not take issue with the fact Monroe Unit 2 was "capable of accommodating" the projected increase. This is understandable, as the evidence establishes the unit was capable of accommodating the higher level of emissions before the Project. *See* Boyd Decl. ¶ 17.

question (and not other factors) caused emissions to increase.[23] As the Seventh Circuit explained, what is required of a company "for determining whether a construction permit must be sought for a planned physical change in the plant is not prescience, but merely a reasonable estimate of the amount of additional emissions that the change will cause." *U.S. v. Cinergy Corp.*, 458 F.3d 705, 709 (7th Cir. 2006) ("*Cinergy I*").

Applying these rules and guidance, in order to establish a violation of the major modification rule, EPA must demonstrate that it would be unreasonable for the utility to conclude that any post-project increase would be caused by factors other than the Project. To meet this burden, EPA must show either (i) that the projected emissions increase could not be accommodated by the unit in the representative baseline period, or (ii) that the "predominant cause" of the increase was the Project, not independent factors.

Rather than applying the legal standard EPA itself has set forth in rules and guidance, EPA in this enforcement action simply assumes what the law requires it to show—that increased emissions were caused by the Project. *See, e.g.*, EPA Mem. at 23 ("[D]ecreasing outage time leads to increased availability and increased availability leads to increased generation and pollution."); *see also* Declaration of Michael J. King ("King Decl.") (Ex. 10) ¶¶ 21-25. The legal standards governing emission projections, however, preclude the use of presumptions and require demonstration that a project is the "predominant cause" of an increase. Because EPA ignores the applicable legal standard, it cannot establish that it is likely to prevail on its claim.[24]

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[23] *See, e.g.*, *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1123-24 (D. Md. 1987) ("In an enforcement proceeding under the Clean Air Act, the burden of establishing a violation of the applicable regulation is on the government.").

[24] Detroit Edison also disputes EPA's assertion that the Company "failed to meet its pre-project obligations for asserting" the independent factors exclusion by having allegedly "failed to provide any information to substantiate its exclusion claim." EPA Mem. at 22-23. Detroit Edison filed the requisite pre-project notification, both created and maintained the information required

(continued…)

EPA's Monroe Unit 2 projection—In support of its factual assertion that the Company should have projected an emissions increase would be caused by the Project, EPA offers two arguments. First, EPA declarants Robert Koppe and Ranajit Sahu postulate: (i) replacement of a deteriorating component reduces unscheduled downtime (forced outage) due to that component; (ii) reducing downtime for a component increases availability for the unit as a whole; and (iii) increasing the unit's availability necessarily causes it to run, and emit, more ("Koppe/Sahu" methodology). *See, e.g.*, EPA Mem. at 23. Thus, according to EPA, repair or replacement of a deteriorating tube component *always* causes unit utilization (and hence emissions) to increase.

Detroit Edison's expert—Michael King—explains in his declaration why this simplistic methodology is inconsistent with the regulations, industry experience, and the reality of utility operation. King Decl. ¶¶ 8-54. For example, Mr. King explains that the Koppe/Sahu methodology (1) is not a past-actual-to-projected-actual calculation as required by the rules, ¶¶ 12-16;[25] (2) is based on a presumed chain of causation that has not been demonstrated or verified in any case, let alone this case, ¶¶ 21-39; and (3) is pre-determined always to show an increase in emissions, contrary to common-sense and utility experience, ¶¶ 48-54. *See also* Boyd Decl. ¶ 13. The fallacy of the Koppe/Sahu methodology was starkly demonstrated in a recent trial, where the Koppe/Sahu methodology "predicted" increases in availability and emissions for all the projects at issue in that case—eight in all. Yet, in reality, post-project emissions were *less* than baseline levels for 7 of the 8 projects in that case. *See* King Decl. ¶ 21.

EPA nevertheless argues that the Koppe/Sahu methodology should be credited here be-

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by MICH. ADMIN. CODE R. 336.2818(3)(c), and provided that information to EPA upon request.

[25] Declarant Koppe, who appeared on EPA's behalf in *Cinergy*, admitted at a deposition in that case that the methodology for determining emissions increases that EPA advanced (and upon which it relies here) is not based on anything found in the NSR rules themselves but, rather, was created for purposes of the litigation during "brainstorming" sessions held with other EPA witnesses and EPA lawyers. *See* Koppe Deposition in *Cinergy* (Nov. 30, 2005), at 131-32 (Ex. 11).

cause it was accepted in *Ohio Edison.* EPA Mem. at 24-26. But in *Ohio Edison,* the defendant did not provide any emissions increase projections and indeed presented no alternative emissions analysis at trial. 276 F.Supp.2d at 834. Here, Detroit Edison undertook an emissions increase evaluation and submitted it to the relevant permitting authority.

Moreover, while EPA has presented the Koppe/Sahu methodology in *every* NSR case brought to date, *Ohio Edison* is the *only* case that accepted it lock, stock, and barrel. In *Cinergy*, for example, the Koppe/Sahu methodology shows emissions increases, as it *always* does, for all 14 projects presented to a jury in the case. The jury, however, rejected this methodology and found no emissions increase in 10 out of 14 projects. Ex. 12. The Seventh Circuit then rejected the methodology for the remaining four projects on appeal.[26] This history does not support EPA's suggestion that it is likely to succeed on the merits.

EPA's second argument relies on the same flawed premise as the first. EPA's declarant Bruce Biewald opines that the 2013 emissions increase projected by Detroit Edison in a notification to MDNRE must be caused by the Project because (1) the model included an improved future forced outage rate for the unit, and (2) system demand was expected to go down after the Project, as a result of the continuing recession. EPA thus contends that the only possible cause for the increased utilization is the Project. *See, e.g.,* EPA Mem. at 25-26.

EPA's argument ignores the factors that accounted for the projected increase in the PROMOD run that was the basis for Detroit Edison's Project notification to MDNRE.[27] EPA's asser-

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[26] As the court observed, "the demand for electricity varies with the day, the time of day, the season, the weather, and other changeable conditions." *Cinergy*, 2010 WL 4009180, at *4. For a unit like Monroe Unit 2 "whose dispatch is … affected by market economics," King Decl. ¶ 46, "[t]here can be no presumption that an increase in its annual capacity would result in a proportionately equal increase in its output." 2010 WL 4009180, at *5. *See* King Decl. ¶¶ 40-47.

[27] PROMOD is a complex "production cost" modeling software used by many utilities (including Detroit Edison) to project system utilization for planning purposes. The PROMOD "run" men-

(continued…)

tion that the decreased forced outage rate in the PROMOD run was due to the Project is conjecture—EPA cites no evidence for this. More importantly, while Biewald acknowledges "other factors" may affect utilization, Biewald Decl. ¶ 19, he ignores them. By contrast, Detroit Edison's expert analyzed the PSCR process and the Company's modeling, and demonstrates that the "other factors" EPA ignores are indeed the likely cause of the projected increases reflected in the 2010 PSCR PROMOD run. King Decl. ¶¶ 101-104 (conclusions); 55-100 (analysis).

For example, Mr. King examined the Company's 2009 PROMOD run and the 2010 PROMOD run (which formed the basis for the Monroe notification)—both of which projected annual utilization for each of the five years following the run. King Decl. ¶¶ 76-93. He observes that the Company's 2009 and 2010 PROMOD runs are very similar in terms of the availability of Monroe Unit 2—in fact, the 2009 run had slightly higher assumed availability for the unit in the modeled years following the outage at issue. *Id.* ¶¶ 78-79. Under EPA's and Biewald's reasoning, one would therefore expect utilization of Monroe Unit 2 to be projected to be higher for the 2009 run as compared to the 2010 run. Yet, the *actual* predictions show the opposite. Not only was Monroe Unit 2 predicted to operate less in the 2009 PSCR run than the 2010 PSCR run, its post-project utilization was predicted to *decrease* from baseline levels in the 2009 PSCR run, while it was predicted to increase from baseline levels in the 2010 run. *Id.* ¶¶ 80-81.[28] This alone is sufficient to demonstrate that the *cause* of the projected increase in the 2010 PSCR run is *not* the change in availability EPA highlights. Rather, it is all the "other factors" EPA ignores.

As Mr. King explains, overall system demand is not the only independent factor relevant

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tioned above was undertaken as part of the Company's annual (2010) Power Supply Cost Recovery ("PSCR") filing with the Michigan Public Service Commission. *See* King Decl. ¶¶ 7, 55-68.

[28] King also examined the most recent PSCR filing—including its underlying 2011 PROMOD run. He reached the same conclusions. King Decl. ¶¶ 94-100.

to the analysis. Rather, especially for a unit like Monroe Unit 2 that is dispatched against a regional market, there are myriad other factors that can affect its utilization. Thus, again comparing the 2009 PSCR run to the 2010 PSCR run, King found that the two runs included different "system assumptions" as to the future, including different predictions of the wholesale electricity market prices, fuel prices (including gas price volatility), emission allowance prices, and "unit demand." King Decl. ¶¶ 84-93. King concludes that many factors, *all of which are independent from the Project*, are what account for the predicted increase in utilization of Monroe Unit 2 in the 2010 PSCR run. *Id.* ¶¶ 101-104. That is precisely the conclusion that Detroit Edison reached before it undertook the Project, as Detroit Edison explained to EPA. Boyd Decl. ¶ 17.

In short, Detroit Edison made a reasonable engineering judgment before the Project that the Project would not result in an emissions increase. This is consistent with Detroit Edison's experience (and the experience of the utility industry generally). *Id.* ¶ 13. EPA's second-guessing after the fact does not demonstrate a substantial likelihood of success on the merits.

II. There Is No Harm, Much Less "Irreparable" Harm.

A "showing of 'probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.'" *See Lucero v. Detroit Pub. Sch.*, 160 F.Supp.2d 767, 801 (E.D. Mich. 2001), *quoting Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990). EPA's claims of great and imminent harm resulting from a project that Detroit Edison undertook only a matter of months ago are implausible. This action is but the most recent case in an "enforcement initiative" EPA began against the utility industry in 1999. In this initiative, EPA has alleged over 350 similar projects occurring during the last three decades at more than 170 units violated NSR, with EPA still litigating cases filed as early as November 1999.

Against this background, it strains credulity for EPA to argue that tube replacement projects undertaken at one unit a few months ago are causing such grave harm that this Court must

step in with the extraordinary remedy of a preliminary injunction. This is especially true here, because emissions for the Monroe Plant as a whole will be substantially less in 2010 than they ever were in the past and will continue to decline substantially in the next few years. *See* Rogers Decl. ¶ 10. Furthermore, in its August 30 Order, this Court foreclosed any possibility of harm by accepting Detroit Edison's proposal to operate Monroe Unit 2 at no more than pre-project levels, and ordering the Company to so operate. Doc. No. 29 at 1-2. For these reasons alone, the Court should deny the motion. *See Livonia Property Holdings,* 2010 WL 1956867, *4-5 (failure to prove irreparable harm "usually fatal" to preliminary injunction).

To "constitute irreparable harm," an "injury must be certain, great, *and actual*." *Lucero*, 160 F.Supp.2d at 801, *quoting Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis added). It must also be imminent and cannot be speculative. *Id.* For the following reasons, EPA has failed to make any showing of actual harm, let alone irreparable harm, arising from the Project at Monroe Unit 2.

A. There Can Be No Harm Where Detroit Edison is Complying with Valid CAA Permit Limits Established by the State to Protect Public Health.

Monroe Unit 2 operates pursuant to a state-issued CAA permit that contains emissions limitations set by the State to meet and maintain the NAAQS, *i.e.*, to meet air quality standards that EPA has determined protect public health with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). EPA does not claim Detroit Edison has exceeded or would exceed these limits as a result of the Project—in fact, these limits are set on the basis of the unit operating at full capacity all the time, a level at which Monroe Unit 2 never actually operates. Indeed, there can be no dispute that, before the Project (or had the Project not been done), Monroe Unit 2 could lawfully increase its emissions up to its full, theoretical "potential to emit" consistent with the NAAQS. Moreover, MDNRE recently issued a permit for Monroe Units 3 and 4 in which it analyzed the

impact of *all four* units at the plant—each operating at its full potential to emit—and found that even such operations would be consistent with the NAAQS. *See* Boyd Decl. ¶ 11.

EPA's theory of "irreparable harm" thus rests on the assertion that the same level of emissions that, *as a matter of law*, protects public health with an adequate margin of safety before the Project now causes grave and imminent harm after the Project. For EPA to succeed on its theory of harm, this Court would have to conclude EPA's NAAQS are not adequate. But that conclusion is diametrically opposed to what EPA has determined in a legislative rulemaking setting the NAAQS, and that determination may not be supplanted in this action. 42 U.S.C. § 7607(b)(2). In any event, a theory under which the same emissions that are protective of public health with an adequate margin of safety under the CAA are simultaneously emissions that cause grave and imminent harm is neither reasonable nor logical. *Cf. North Carolina v. TVA*, 615 F.3d 291, 310 (4th Cir. 2010) ("TVA's plants cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them.").[29]

Here, the State permitting authority has already determined Monroe Unit 2's emissions

[29] EPA cites the lower court's decision in *North Carolina* for the proposition that exposure to $PM_{2.5}$ "even when the exposure occurs at levels at or below the NAAQS" justified injunctive relief in that case, claiming the Fourth Circuit reversed that decision "on other grounds." EPA Mem. at 27 (citing *North Carolina v. TVA*, 593 F.Supp.2d 812, 822 (W.D.N.C. 2009), *rev'd*, 615 F.3d 291 (4th Cir. 2010)). Nothing can be further from the truth. The court's reversal of that decision was sweeping and wide-ranging, and it specifically included a ruling that the alleged harm below the NAAQS *cannot* justify the lower court's injunction. The Fourth Circuit noted: "the EPA's regulations regarding NAAQS and the SIPs implementing them are understandably designed to protect even those individuals particularly sensitive to emissions." 615 F.3d at 310.

EPA also cites *Cinergy* but fails to acknowledge even that court found, after a full trial, that the alleged "harm" from "excess emissions"—which, there, were emitted over more than 15 years—insufficient to justify controls on other units at which no NSR violations were found. *U.S. v. Cinergy Corp.*, 618 F.Supp.2d 942, 967 (S.D. Ind. 2009), *rev'd*, 2010 WL 4009180 (7th Cir. Oct. 12, 2010). It should not be sufficient in the more limited setting of a motion for preliminary injunction. Moreover, such "relief" reaching plants at which no liability was found is punitive in nature and therefore not appropriate here. *See Nat'l. Union Elec. Corp. v. Wilson*, 434 F.2d 986, 988 (6th Cir. 1970) ("Punitive damages are not awarded ordinarily in equity cases").

are consistent with the NAAQS and other CAA programs and do not adversely affect air quality. *See* Boyd Decl. ¶ 11. Moreover, $PM_{2.5}$ air concentrations have been steadily declining in Southeastern Michigan to below the NAAQS. Wolff Decl. ¶¶ 12-13. And EPA has established or proposed, in legislative rulemakings, a number of additional programs pursuant to which Detroit Edison, as well as the entire utility industry, is installing billions of dollars of controls to continue reducing emissions.[30] As a result, EPA's allegations of irreparable harm are without merit.

B. EPA's Claims Regarding "Irreparable Harm" Arising From Alleged "Excess Emissions" Are Legally and Factually Flawed.

To avoid grappling with the lack of actual air quality impact of the Project, EPA claims harm based on theoretical "excess emissions," which it says is the difference between expected post-project emissions at Monroe Unit 2 with and without BACT. Even assuming this *difference* in projected emissions could give rise to "harm," EPA's measure of excess emissions is purely hypothetical and incorrect as a matter of law; it provides no basis for a preliminary injunction.

1. The Definition of "Major Modification" Compels the Conclusion that the Increase in Emissions from a Project is the Measure of the Harm Allegedly Caused by the Project.

NSR is not an emissions reduction program, as EPA has repeatedly acknowledged. It is a program that is concerned with regulating emissions *increases*. *See supra* at 2-3. Indeed, a "major modification"—the alleged violation here—is defined as a physical change that results in a significant emissions increase of a regulated pollutant. MICH. ADMIN. CODE R. 336.2801(aa)(i). Because it is the *increase* in emissions that defines the violation, it follows inexorably that it is the *increase* in emissions that provides the measure of harm, if any.

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[30] These include revised NAAQS, the NO_x SIP Call, and the Clean Air Transport Rule (CATR). CATR was recently proposed (75 Fed. Reg. 45,210 (Aug. 2, 2010)) to replace CAIR, an existing rule that was remanded by the D.C. Circuit and left in place pending revision. *See North Carolina v. EPA*, 550 F.3d 1176, 1178-79 (D.C. Cir. 2008). CATR, and the current CAIR, seek to address the impact of a state's air emissions on downwind states' abilities to meet the NAAQS.

Indeed, there is no dispute that if a company undertakes a physical change that would not increase emissions, the source can continue emitting at its pre-project level, and these emissions would presumably not cause harm, as a matter of law. Similarly, even if a project would otherwise potentially increase emissions, a company can avoid NSR by implementing other measures to avoid such an increase—*e.g.,* by offsetting any such increases at the unit or plant, or accepting permit limits to keep the unit's emissions within baseline levels (called a "synthetic minor" permit). *See* Campbell Decl. ¶ 11; Boyd Decl. ¶ 14. There too, the source can continue emitting lawfully at its pre-project level, and these emissions would not cause harm, as a matter of law.

Given these indisputable facts, the only harm that could ever arise from an alleged "major modification" would be any increase in emissions actually caused by the Project—which is what would make that project a "major modification" in the first place. Accordingly, EPA's claims of "excess emissions" in this case are grossly inflated[31] and cannot support a preliminary injunction.

Moreover, Detroit Edison has voluntarily committed to keep its annual emissions after the Project below baseline levels pending resolution of this matter, and that commitment has now been embodied in an interim court order. Doc. No. 29 at 1-2. As a result, there is no possibility there could be an NSR-triggering increase in annual emissions after the Project. This alone makes a preliminary injunction improper.

2. EPA Wrongly Presumes that a Finding of Liability Would Require this Court to Order BACT at Monroe Unit 2.

According to EPA, if the Monroe Unit 2 Project were deemed to be a major modification, "NSR requires [the] modified source to install … current best available control technology" or

[31] Even EPA's own expert, Dr. Sahu, estimates project-related emissions are only a fraction of what EPA alleges to be "excess emissions." *See* EPA Mem. at 25-26; Sahu Decl. ¶¶ 10, 18-19 (calculating post-project emissions increases of 735 tons/year for NO_x and 1382 tons/year for SO_2, but claiming "excess emissions" as 7,942 tons/year NO_x and 26,525 tons/year SO_2).

BACT. EPA Mem. at 26. EPA then claims that the "harm" flows from the "excess emissions" over that level of control. EPA's "excess emissions" theory thus presumes that, if this Court were to find that the Project was a "major modification," it would be required as a matter of law to impose BACT at Monroe Unit 2. That presumption is incorrect. Should this Court find, after a full trial on the merits, that the Project could possibly result in an emissions increase in some future year (had Detroit Edison not committed to limit post-project operations to baseline), this Court unquestionably has the equitable power to remedy the (theoretical) "violation" by returning the parties to the *status quo ante—e.g.*, ordering Detroit Edison to ensure the Project would not result in an annual emissions increase, indefinitely. The alleged harm cannot be based on the difference between current emissions from Monroe Unit 2 and a theoretical BACT level that this Court is not required to impose even if it were to find liability, after a full-fledged trial.

The fundamental premise of EPA's position is that NSR is a "trigger" program—as EPA puts it, once the Project was done, the unit's "grandfathered status under the law has ended," *see* EPA Mem. at 29—and therefore BACT-level controls are now automatically required. As the First Circuit held, rejecting a similar EPA argument in analogous circumstances involving a "trigger" program, the "'grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances'"; unless "'Congress specifically commands a particular form of relief, the question of remedy remains subject to a court's equitable discretion.'" *U.S. v. Mass. Water Res. Auth.*, 256 F.3d 36, 48 (1st Cir. 2001) ("*MWRA*") at 48 (*quoting Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 322 (1982)).

In *MWRA*, the First Circuit upheld the district court's discretionary authority to grant an injunction that preserved the *status quo ante—i.e.*, the *status quo* that preceded the alleged violation—and allowed the defendant *after-the-fact* to "avoid" triggering the violation. Specifically,

the federal Safe Drinking Water Act ("SDWA") program at issue provided that any public water system that did not meet certain *avoidance* criteria by a date certain was required to install very expensive filtration systems. "The upshot of this regulatory scheme," the court explained, "is that once a public water system has been found to have violated one of the avoidance criteria, it forever remains subject to an enforcement suit requesting the installation of a filtration system." *Id.* at 40. EPA argued that, since it is conceded that MWRA failed to meet the avoidance criteria by the required date, the filtration requirement was "triggered," and the district court has no discretion to grant a remedy that falls short of requiring filtration. *Id.* at 47. The court found, however, no "necessary and inescapable inference" that the regulatory regime constrained a court's equitable power to fashion a remedy. *Id.* at 54. The court rejected EPA's argument that because it can bring an action to "require compliance," the court is required to issue an injunction requiring filtration. *Id.* at 52-53. The court further found compelling that "under the Act, if a water system never violates any of the avoidance criteria, its water is presumptively 'safe' according to the SDWA, regardless of whether it ever installs a filtration system." *Id.* at 56. In other words, if the *status quo ante* is lawful under the statute, the court found it unquestionably had the equitable authority to grant injunctive relief that goes no further than restoring that *status quo*.

The CAA enforcement language even more clearly preserves the Court's equitable discretion. While EPA can bring an action for an injunction, the CAA does not specify in any way what that injunction entails. *See* 42 U.S.C. § 7413(b); *cf. MWRA,* 256 F.3d at 52-53 (construing SDWA provision specifying EPA may seek injunction "to require compliance"). And § 7413(b) merely gives the Court jurisdiction to entertain various remedies; it does not specify what it must do. *Cf. id.* at 54-55 (discussing jurisdiction-granting provision). More importantly, pre-project baseline emissions levels were unquestionably lawful under the CAA before the Project was un-

dertaken—as the *MWRA* court put it, these levels were "safe" under the statute. *Cf. id.* at 56. A remedy that, for example, maintains these levels (as the Court has already done, even in the interim), is well within this Court's equitable authority. Because the Court could order such a remedy, after a full trial on the merits, EPA cannot reasonably claim that "irreparable harm" is caused by emissions in excess of levels that EPA may not be entitled to obtain, even after such a trial. Accordingly, because EPA's preliminary injunction motion is based on an incorrect legal premise—*i.e.*, that violation of NSR requires BACT retrofit—EPA can neither establish irreparable harm nor show that it is likely to prevail on its claim for retrofit of BACT.

3. EPA's Measure of Alleged "Excess Emissions" Is Factually Flawed.

As discussed above, the premise of EPA's motion—that the only way lawfully to proceed with the Project would have been to obtain an NSR permit and install BACT—is wrong. In fact, no rational company would elect to undertake a costly permit process and install $630 million worth of control equipment for a tube replacement project because such additional costs would make the project "extremely uneconomical." Boyd Decl. ¶ 14. This is especially true since there are other much less costly, lawful options available. *See id.*; Campbell Decl. ¶¶ 11-19. As Colin M. Campbell, an expert with over 15 years of experience in evaluating NSR requirements and preparing permit applications, explains, no company has ever obtained an NSR permit for projects similar to that at issue here. *Id.* ¶ 12. In 99% of the instances in which companies consider work that otherwise would be a major modification, they complied with NSR by implementing a much less costly approach to avoid emissions increases from, or following, the project.[32] *Id.*

Here, had there been any doubt that the Project was not a modification, Detroit Edison

[32] "Options include (1) implementing administrative and other constraints on the unit as a part of the project to offset any potential increase otherwise associated with the projects; (2) securing a 'synthetic minor' permit, which would keep emissions at baseline plus a significance threshold; and (3) 'netting' emissions …." Boyd Decl. ¶ 14; *see* Campbell Decl. ¶¶ 11-12.

could have simply postponed the Project until it was ready to proceed with the advanced pollution controls it was already planning to install on Monroe Unit 2 by 2014. *See* Boyd Decl. ¶ 14. More likely, had there been any doubt, Detroit Edison could have implemented one of the alternative approaches mentioned above, such as limiting post-project emissions to baseline levels, as it is currently doing. *Id.*; Campbell Decl. ¶ 13.[33] The measure of "harm" from allegedly violating NSR cannot possibly be more than it would have taken to comply with NSR in the first place.

C. Even if EPA's "Excess Emissions" Were the Correct Measure, Detroit Edison Has Already "Offset" Them, and EPA's Claims Regarding the Alleged Health Effects EPA Attributes to Monroe Unit 2 Are Not Supportable.

1. Detroit Edison Has Already "Offset" any "Excess Emissions."

Even if EPA's imaginary "excess emissions" were the proper measure,[34] Detroit Edison has "offset" them at Monroe by a wide margin. In 2009, Detroit Edison started operating the existing Units 1, 3, and 4 SCRs year-round (instead of just the "ozone season") and finished the construction and tie-in of two new FGDs at Units 3 and 4. Rogers Decl. ¶¶ 7, 9. As a result,

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[33] In *Cinergy*, the court rejected Cinergy's argument that it would have obtained a synthetic minor permit cap for SO_2 emissions instead of installing advanced controls. *See* 618 F.Supp.2d at 961-962. That court based its ruling, however, on a fact-intensive analysis, weighing evidence on both sides before deciding that Cinergy's position was not credible. *Id.* at 962. Here, the facts are incontrovertible. Not only have Detroit Edison's declarant—Skiles Boyd—and an expert—Colin Campbell—confirmed that a compliance approach short of obtaining an NSR permit would have been the only rational choice here, but Detroit Edison has demonstrated the validity of this claim by proposing to EPA and the Court to limit the Monroe Unit 2 emissions to pre-project levels, and the Court has ordered it, at least while it considers the case. Moreover, the *Cinergy* court's conclusion is utterly illogical. It concluded Cinergy would not have obtained a synthetic minor limit for its projects because Cinergy presented no evidence of it having ever obtained such a limit for any similar project. The court glossed over the fact that, conversely, neither Cinergy, *nor any other utility*, had ever obtained an NSR permit for similar component replacement projects. *See* Campbell Decl. ¶ 12 ("I am not aware of any facility of this type that has obtained either an NSR permit or a synthetic minor permit for maintenance projects such as the projects at Monroe Unit 2, because to my knowledge no utility has ever determined that such maintenance activity would trigger NSR."); Boyd Decl. ¶ 14. It also bears noting the *Cinergy* judgment was reversed, albeit on the merits (*i.e.*, other grounds). *Cinergy*, 2010 WL 4009180.

[34] EPA inflates its "excess emissions" even further by theorizing a level of BACT for Monroe Unit 2 that is substantially lower than the BACT level MDNRE—the State authority charged by the Act to make BACT determination—determined for the Monroe units. Rogers Decl. ¶¶ 14-15.

compared to baseline, average emissions in 2005-2008, Detroit Edison will have reduced emissions from Monroe by an annual average of over 18,000 tons NO_x and 52,400 tons SO_2—or roughly *double* EPA's theorized "excess emissions" from Unit 2. *Id.* ¶ 13; *see also id.* ¶ 10.

2. EPA's Claims Regarding the Alleged Health Effects EPA Attributes to "Excess Emissions" from Monroe Unit 2 Are Not Supportable.

Further, even if it were permissible and appropriate to assume that the alleged "harm" here is that attributable to EPA's imaginary "excess emissions," the public health consequences that EPA's declarants ascribe to those emissions cannot be credited, as they attack the adequacy of EPA's NAAQS and are based on fundamentally flawed analyses. For example, EPA alleges, based on the declaration offered by Dr. Joel Schwartz, that the State and EPA-permitted emissions from Monroe Unit 2 will cause approximately 90 premature deaths per year in the communities downwind of the plant.[35] EPA Mem. at 28. EPA further alleges, based on Lyle Chinkin's declaration, that the alleged "excess emissions" cause increased $PM_{2.5}$ concentrations across a "swath of the Midwest," in areas already out of compliance with the NAAQS. *Id.* Detroit Edison's own experts explain why these statements are not true and are unreliable.

As to Dr. Schwartz' alarmist assertions regarding the impact of the "excess emissions" on public health, Detroit Edison's expert concludes in a detailed and comprehensive report that Dr. Schwartz' selective use of evidence obscures the fact there is considerable uncertainty and inconsistency in the scientific literature regarding health impacts from exposure to $PM_{2.5}$ and what sources may be responsible for any such exposure. Declaration of Suresh Moolgavkar ("Mool-

[35] EPA's sensationalist "90 premature death" figure should be dismissed out of hand, for even courts that have been willing to credit arguments that harm can result from emissions below the NAAQS have refused to adopt such sensationalist "estimates." For example, even the *North Carolina* court (which the Fourth Circuit reversed) found the claim there that TVA's plants were causing 98 deaths per year "is fraught with uncertainty, due to disagreement among leading experts about the percentage decreases in premature mortality likely to result from incremental decreases in $PM_{2.5}$." 593 F.Supp.2d at 822, *rev'd*, 615 F.3d 291.

gavkar Decl."), Ex. 13, ¶¶ 10-14. Dr. Moolgavkar explains "there are no studies that can support scientifically reliable *quantitative* estimates of health impacts of emissions from any power plants, including, specifically, the coal-fired power plants in the Detroit metropolitan area, let alone individual units in a plant." *Id.* ¶ 9. Indeed, one of the most comprehensive epidemiologic studies conducted in the U.S. analyzed eight years of data in the Detroit metropolitan area and found no association between particulate matter and mortality there. *Id.* ¶ 15.[36]

Detroit Edison's experts also address Chinkin's claims regarding the alleged impact of "excess emissions" from Monroe Unit 2 on the Midwest. For example, Dr. George T. Wolff, recognized by the State of Michigan and others as a leading expert in air quality issues in Southeastern Michigan, shows Chinkin's assertion that the Detroit-Ann Arbor region was not attaining the $PM_{2.5}$ NAAQS in 2009 is wrong. Wolff Decl. at ¶¶ 7-14. Based on air quality data, location of monitors and actual meteorology, Chinkin's modeling does not and cannot show any "excess emissions" from Monroe Unit 2 contributed to nonattainment in the Detroit area or in other Midwest cities. *Id.* ¶¶ 7, 15-38. Indeed, Wolff shows that a proper analysis of actual air quality data reveals that sources other than Monroe were the cause of any nonattainment prior to 2009, a finding consistent with reports by Michigan and regional air pollution bodies. *Id.* ¶¶ 7, 31-38.

The unreliability of Chinkin's claims is further underscored by Ralph Morris, a renowned expert in air quality modeling who created the very model Chinkin used (CAMx), and Stanley Hayes, a well-known expert in evaluating air-related environmental impacts of power plants emissions. For example, Morris finds that, based on significant errors in calculation, methodolo-

[36] Schwartz' calculations of alleged mortality are also based on unreliable atmospheric modeling and analyses. *See* Declaration of Stanley R. Hayes ("Hayes Decl."), Ex. 14, ¶¶ 12, 39-43 (finding Schwartz' estimates based on outdated methods and unsupported assumptions, not on state-of-the-science modeling); Declaration of Ralph E. Morris ("Morris Decl."), Ex. 15, ¶¶ 54-57 (explaining Schwartz used a "highly simplified" and "inferior" tool for estimating air quality).

gies and models chosen, bias and unaccounted for uncertainties, Chinkin overstates the potential reduction in $PM_{2.5}$ concentrations he says would result from controlling the "excess emissions" and generates results that are inconsistent with EPA's own estimates of Monroe's contribution to ambient $PM_{2.5}$ levels. Morris Decl. ¶¶ 8, 15-19, 21-48. Indeed, Morris shows Chinkin's estimates of alleged air quality impacts from "excess emissions" are so small as to be within the uncertainty of the model itself. *Id.* ¶¶ 8, 49-52. Similarly, Hayes shows Chinkin's estimates are based on data with significant material uncertainties and any effects from EPA's alleged "excess emissions" are but a small percentage of ambient $PM_{2.5}$ levels, many times less than the NAAQS, and so small as to be near or below levels EPA considers insignificant. Hayes Decl. ¶¶ 11, 20-38. For all of these reasons, EPA fails to demonstrate any irreparable harm.

III. An Injunction Would Cause Detroit Edison Substantial Harm.

EPA seeks to require Detroit Edison to (i) "[b]egin the process of obtaining NSR permits" for Monroe Unit 2, and (ii) "[a]pply interim pollution controls or otherwise reduce emissions" from certain of the Company's "other … coal-fired units in order to mitigate the emissions" from Monroe Unit 2. EPA Mem. at 30. Thus, in advance of any final ruling on the merits, EPA would have this Court order Detroit Edison to begin a process that would consume thousands of man-hours and culminate in installation of the same emission controls at Monroe Unit 2 that the Company is *already* on course to install; and to install "interim" controls on other units not at issue here—a remedy that the *only* court to ever reach a remedy trial refused to award, even though it sided with EPA on virtually every other issue. *See Cinergy*, 618 F.Supp.2d at 966. The requested relief is unwarranted and would cause Detroit Edison substantial harm.

First, Detroit Edison plans to complete construction and begin operation of FGD and SCR control systems at Monroe Unit 2 by 2014. Given site constraints and other controls being constructed at the Plant, it is not feasible to expedite the installation of these controls. Rogers

Decl. ¶ 11. Requiring Detroit Edison to undertake the pointless process of applying now for an NSR permit to require controls already underway would accomplish nothing meaningful, while diverting company resources away from its ongoing emission reduction efforts at Monroe.

Second, putting aside the fact that Detroit Edison's recent installation of advanced controls on other units at the Monroe Plant more than offsets whatever "excess emissions" EPA ascribes to the Project, *see* Rogers Decl. ¶ 13, EPA's proposed "interim remedy" is deeply flawed because (1) it would not achieve the reductions theorized by Dr. Sahu, and (2) its cost is much more than the $39 million EPA posits. *Id.* ¶¶ 17-34. Specifically, William Rogers, a Detroit Edison specialist in pollution control technology, explains that the Belle River and Trenton Channel units *already* have very low NO_x and SO_2 emissions rates, and thus Dr. Sahu's rate estimates are unachievable there. *Id.* ¶¶ 17-18. Moreover, as Rogers explains in detail, the approaches and technologies that Dr. Sahu proposes are not feasible for the plants considered, would not be recommended, would cause operational problems or long delays in permitting and installation, or are already in place at their maximum potential. *Id.* ¶¶ 19-29. This is not surprising given Dr. Sahu's acknowledgement that he did not analyze the feasibility of the controls but merely assumed they could be successfully implemented at Belle River and Trenton Channel. Sahu Decl. ¶ 22. Even assuming such controls could be installed and permitted in a short period of time—which EPA itself acknowledges is unlikely—they would require additional capital and operating costs (up to $56 million in capital and $33.5 million in annual operating costs, and potentially an additional $100 million for additional PM controls). Rogers Decl. ¶¶ 30-34.

EPA's casual assertion that the cost of interim controls is "minimal" is therefore wrong. Moreover, Detroit Edison is already spending billions of dollars on pollution controls on its system. *Id.* ¶ 7; Boyd Decl. ¶ 8. The *additional* cost that EPA asks this Court to impose in the "in-

terim" is not in lieu of these billions of dollars, but on top of it. Put simply, even an additional $39 million is not a small amount of capital to raise at this time, especially in the current economic climate. Boyd Decl. ¶¶ 23-24. The harm to Detroit Edison would be substantial.

IV. An Injunction Is Not in the Public Interest.

Because there is no harm, much less "irreparable" harm, the injunctive relief EPA seeks is contrary to the public interest. The costs to Detroit Edison would constitute harm to the public as well, through increased costs of electricity for the ratepayers. *See*, *e.g.*, *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 357 (10th Cir. 1986) ("The 'public interest' in a public utility case is actually the interest of purchasers of electric power."). The deepest recession Michigan has seen since the Great Depression is not the time for EPA to increase ratepayer costs beyond what is already required by Detroit Edison's $2 billion control plan, by *any* amount. *See* Boyd Decl. ¶ 24. The public interest here lies in the Court's rejecting EPA's motion and setting this matter for trial following development of a full evidentiary record.

CONCLUSION

For the foregoing reasons, EPA's motion should be denied.

Respectfully submitted, this 4th day of November 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record as follows:

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This 4th day of November, 2010.

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